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Report to the Chairman, Committee on Post Office and Civil Service, House of Representatives

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POSTAL SERVICE

Board of Governors' Contract for Legal Services

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of the United States

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February 10, 1987

The Honorable William D. Ford
Chairman, Committee on Post Office
and Civil Service
House of Representatives

Dear Mr. Chairman:

This report responds to your request that we inquire into and report on several issues related to legal work performed by a private law firm under contract with the U.S. Postal Service's Board of Governors. A partner of the firm serves as Counsel to the Board.

Based on your letter requesting the work and on agreements reached in subsequent meetings with your representatives, this report provides information on: (1) the Board's contract for legal services, (2) the process used by the Board to authorize leaving legal work done by its outside counsel, (3) the total cost of such work, (4) the Board's authority to approve Postal Service expenditures, (5) the Service's authority to expend funds for legal services provided by the Board's outside counsel in connection with investigations of actions by the Board's Chairman, Mr. John R. McKean, and (6) Mr. McKean's involvement, as Board Chairman, in the Board's decision to pay for legal services done in connection with the investigations.

To respond to your request, we interviewed both Postal Service and Board officials and reviewed relevant laws, regulations and policies governing the Board's operations and employees' conduct. We also obtained and analyzed (1) transcripts of the Board's open and closed meetings dealing with the authorization of and payment for legal work and (2) the bills submitted by the Board's Counsel for the last 3 months of fiscal year 1985 through the first 9 months of fiscal year 1986. Our work was performed from September 1985 through September 1986 at the Postal Service's Washington, D.C. headquarters in accordance with generally accepted government auditing standards.

The results of our work are summarized below. Appendix I provides details on the costs incurred by the Board for all legal services provided by its outside counsel since the inception of the contract for such services in June 1985. Appendix II provides our opinions on the legal issues involved.

Board of Governors' Contract for Legal Services

From its founding in 1970 until June 1980, the Board was represented in legal matters by the Postal Service's General Counsel and received legal assistance from attorneys employed by the Service's Law Department. The Service's General Counsel was also the Board's Counsel. In June 1980, after deciding that it needed independent legal assistance, the Board selected the private law firm of Califano, Koss and Heineman to provide legal services. Mr. Joseph A. Califano, Jr., served as the Board's Counsel. In January 1983, the contract was shifted to the law firm of Dewey, Ballentine, Bushby, Palmer and Wood when Mr. Califano became a partner in the firm. Mr. Califano continued to serve as the Board's Counsel.

The current contract has no fixed term or amount. It can be terminated by either party with a written 30-day notice that is addressed to or signed by the Board's Chairman. The current maximum hourly rates for attorneys are $160 for Mr. Califano, $160 for other partners and $140 for associates. The contract also provides for reimbursing all "other" out-of-pocket costs incurred incident to providing legal services (e.g., travel and administrative expenses).

How Legal Services Are Authorized and Paid for

From the June 1980 beginning of the contract for outside counsel, until January 1985, any Governor on the Board could ask Mr. Califano or other attorneys in the two firms he has been associated with to provide legal services. However, the Board's Executive Secretary told us that, in January 1985, the Board's Chairman advised the other Governors that all future requests for legal work should come through him or the Board's Executive Secretary to ensure that (1) both knew of all work being done, (2) there was no duplication of effort requested, and (3) priority work was done first. In September 1986, the contract was changed to provide that services other than attendance at meetings of the Board of Governors will be furnished only on the specific request of the Chairman (or, in the absence of the Chairman, the Vice-Chairman) who will identify the particular matter on which advice and counsel is requested.

The monthly bills submitted by the Board's Counsel generally describe the work done and the main issues involved (e.g., reviewing transcripts and pleading at the Postal Rate Commission concerning the Service's proposed sale of its electronic communications service). The Board's Executive Secretary approves the bills for payment by the Service. The Board as a whole does not authorize or approve payment for the total bill or for any of the specific tasks performed. Starting in September

1986, the monthly bills are to identify the particular legal services rendered and copies of the bills are to be distributed to the Chairman of the Board, the Chairman of the Board's Audit Committee, and the General Counsel of the Postal Service.

Cost of Legal Services

Cost data for the Board's contract for legal services is shown in two tables in appendix I. Table I.1 shows that total contract costs, including the 4 months the contract was in effect in fiscal year 1980, through the first 10 months of fiscal year 1986 amounted to about $2.9 million. The costs for the first full fiscal year of the contract—1981—were $295,100. In comparison, the costs for the most recent full fiscal year (1985) at the time of our review were $666,100. Table I.2 shows that both the cost of attorney's fees and incidental expenses have contributed to this increase.

Authority of Board and Postal Service to Expend Funds for Legal Services

The Postal Reorganization Act of 1970 provides the Board of Governors with the authority to direct and control the expenditures of the Postal Service. 39 U.S.C. § 205(a). Similarly, the Service has broad authority under the Act to expend such funds as it deems necessary for carrying out the purposes of the Act. Thus, we believe the Board has the authority to approve, and the Service to make, expenditures for legal services in support of the official interests of the Board and the Service.

Board Authority Not Unlimited

The Board's authority to expend funds for legal services is not, however, unlimited. In this regard, the Postal Reorganization Act makes clear that Postal Service funds are available only to carry out the purposes, functions, and powers authorized by the Act and that funds must be expended in furtherance of official interests of the Postal Service. 39 U.S.C. § 2003. Thus, Postal Service funds are not available to pay the personal expenses of any Postal Service employee. Equally clear is the principle that federal agencies, such as the Postal Service, cannot expend funds for the legal representation of any employee for acts which occurred prior to their federal employment. 28 C.F.R. §§ 50.15-50.16; 55 Comp. Gen. 408 (1975). Such legal expenses are consistently regarded as the personal expenses of the employee rather than expenses undertaken to further the official interests of the government. Mr. McKean's March 1984 testimony before the Senate Judiciary Committee was wholly on his preemployment activities. We do not believe any official interest of the Board was served by preparing Mr. McKean for, and *providing* him representation during, the Senate hearings.

The record supports the view that Mr. Califano appeared with Mr. McKean before the Senate Judiciary Committee solely to represent Mr. McKean's personal interests. The hearings were on the nomination of Mr. Edwin Meese III to be Attorney General of the United States. Mr. McKean's participation in the hearings concerned the allegations that Mr. Meese's recommendation of Mr. McKean's appointment was influenced by certain loans Mr. McKean had arranged for Mr. Meese. Mr. McKean's testimony focused entirely on his relationship with Mr. Meese before he was appointed to the Board of Governors. Mr. McKean was not asked to testify on any matter even remotely related either to his duties as a member of the Board or to Postal Service activities. There is nothing in the record to justify Mr. Califano's presence at the hearings in his capacity as the Board's Counsel. The Committee was not interested in, nor did it solicit the views of, the Postal Service or the Board of Governors.

The Postal Service was thus not authorized to pay for Mr. Califano's representation of Mr. McKean. Because the bills submitted by the Board's Counsel do not identify charges with specific tasks, it is not feasible for us to determine the amount of Service funds expended for this work. Moreover, since we do not have authority to settle claims or accounts with respect to the Postal Service, our opinion on these expenditures is advisory only. This issue is discussed in more detail on pages 14 to 18 of appendix II.

Board Chairman's Involvement in Decision to Pay for Legal Fees

Chairman McKean's participation in the Board's decision to pay for legal services connected with the investigations of his actions did not violate the criminal conflict of interest law in 18 U.S.C. § 208(a). This issue is discussed in detail on pages 18 and 20 of appendix II.

Comments of the Board's Executive Secretary and Counsel

The cost data included in appendix I, and the above information on the contract for legal services and how such services are authorized and paid for, was reviewed by the Board's Executive Secretary. Minor changes, orally suggested by the Secretary, were made in preparing our final report. A draft of appendix II providing our opinions on the legal issues involved was given to the Board's Counsel for review and comment. By letter dated August 18, 1986, (see app. III) the Counsel for the Board disagreed with our legal conclusion that the Board had no

authority to pay for legal services provided in support of Mr. McKean's appearance before the Senate Judiciary Committee.

The Board's Counsel points out that we have said the Board had an official interest in conducting, and could properly pay for, an investigation into the allegations concerning Mr. McKean, and argues that we have no basis to treat the expenses incurred to defend Mr. McKean at the hearings any differently from these investigative activities. We do not agree. The allegations against Mr. McKean clearly affected the Postal Service and it had an official interest in investigating them. Among other things it needed information to respond to inquiries from Congress and others. However, because the allegations concerned Mr. McKean's personal conduct before he became a member of the Board, conduct that had nothing to do with the business of the Postal Service, the Board had no official interest in defending Mr. McKean against those allegations.

The Board's Counsel offers two arguments to support its view that Mr. Califano's appearance with Mr. McKean at the hearings furthered official interests of the Postal Service and that it therefore had the authority to pay for those services. First, Counsel asserts that the Senate Committee asked Mr. McKean to testify "on matters related directly to [Mr. McKean's] tenure on the Board," and "about allegations concerning the manner in which the President had appointed a member of the Board." As we understand it, the argument is that Mr. McKean appeared before the Committee in his official capacity as a member of the Board and it was therefore proper for the Board's Counsel to represent him. In our view, the Committee was not interested in the views of the Board or its counsel on the issues at hand, and did not ask for those views. It simply wanted to know if Mr. McKean's appointment to the Board was influenced by loans arranged by Mr. McKean, in his personal capacity, before he became a Board member. The purpose of the hearings was to explore this matter with Mr. McKean personally. We believe the record establishes that Mr. McKean testified in his personal capacity to defend his personal conduct, and that Mr. Califano appeared with Mr. McKean solely to represent him in the defense of his personal conduct, and not on behalf of any official interest of the Board.

The Board's Counsel also argues that the "allegations about which Mr. McKean was to testify threatened to undermine public confidence in the integrity of the Board and all its actions," and justifies the expenditure of Postal Service funds as appropriate because of the Board's concern

that its integrity hinged on Mr. McKean's. In our view, the Board's concerns about the consequences of the hearings did not transform the purpose of the hearings, the identity of the interest at stake, or Mr. Califano's task. The purpose of the hearings was to inquire into loans made by Mr. McKean in his personal capacity, and it was Mr. McKean's personal interests that were at stake, not the Board's. Mr. Califano's task was to represent Mr. McKean's personal interests in those proceedings, and our opinion remains that the Board had no authority to pay for that representation.

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 10 days from the date of this report. At that time we will send copies to interested parties and make copies available to others upon request.

Sincerely yours,

for Milton J. Socolar

Charles A. Bowsher
Comptroller General

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Costs for Legal Services Contract

Table I.1: Annual Costs for Legal Services Contract[a]

Fiscal Year	Total Cost
1980	$88,700[b]
1981	295,100
1982	331,900
1983	427,100
1984	525,300
1985	666,100
1986	581,100[c]
Total	**$2,915,300**

[a]All costs rounded to the nearest $100

[b]Contract in effect for 4 months of fiscal year 1980

[c]Contract costs for the first 10 months of fiscal year 1986

Table I.2: Breakdown of Annual Costs for Legal Services[a] Fiscal Years 1981 to 1985

Fiscal Year	Counsel	Partners	Associates	Other Expenses
1981	$62,700	$123,100	$93,700	$15,600
1982	66,700	113,400	130,700	21,100
1983	74,100	136,100	157,200	59,700
1984	75,700	119,500	221,800	108,200
1985	76,900	194,700	222,600	171,900
Total	**$356,100**	**$686,800**	**$826,000**	**$376,500**

[a]All costs rounded to the nearest $100

Authority of the Postal Service to Expend Funds for Legal Support Services

I. Digests:

1. Under the Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719 (1970), the power to direct and control the expenditures of the Postal Service is specifically assigned to the Board of Governors. 39 U.S.C. § 205(a).

2. The Postal Service has broad authority to expend such funds as it "deems necessary" to carry out the purposes of the Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719 (1970). 39 U.S.C. §§ 2003(a), 2008(c). The Postal Service can expend funds, however, only for those legal services which further official interests of the Service and are not personal expenses of any employee. We do not think that the Postal Service had an official interest in Mr. McKean's testimony before the Senate Judiciary Committee.

3. Mr. McKean's involvement in the Board of Governors' payment of a private law firm's fees did not violate 18 U.S.C. § 208(a), the criminal provision which pertains to conflicts of interest.

II. Background:

In November 1981, the President nominated, and the Senate on March 8, 1982 confirmed, Mr. McKean to be a member of the Board of Governors of the Postal Service (Board). Mr. McKean's term would have expired on December 8, 1986. However, the President nominated Mr. McKean for a second term on January 26, 1983. On February 24, 1983, the Senate confirmed Mr. McKean's appointment. His present term expires on December 8, 1991.

In July 1983, the House Committee on Post Office and Civil Service (House Committee) asked our Office to investigate certain issues that had surfaced in connection with the nomination of Edwin Meese to be Attorney General of the United States. One of the issues involved Mr. Meese's recommendation, while he was counselor to the President, to appoint Mr. McKean as a member of the Board of Governors. In particular, we were asked to examine allegations that Mr. Meese's recommendation of Mr. McKean was influenced by certain loans made to Mr. Meese by Mr. McKean's accounting firm, John R. McKean, Accountants, P.C. In response to GAO's investigation and the allegations reported in the press concerning Mr. McKean's appointment, Mr. Robert Hardesty, then the Chairman of the Board of Governors, directed the Board's counsel, the firm of Dewey, Ballantine, Bushby, Palmer & Wood (Dewey,

Ballantine or firm), to independently investigate the allegations surrounding Mr. McKean's appointment and to handle requests for information concerning this matter. Mr. McKean stated that Chairman Hardesty had directed Dewey, Ballantine to provide such legal support "at my request." Transcript of Closed Meeting of the Board of Governors at 1 (April 1984).

Subsequently, the Senate Judiciary Committee, acting in support of the Senate's constitutional duty to advise and consent to the Presidential nomination of Edwin Meese, initiated an investigation into Mr. Meese's role in a variety of matters, including the nomination of Mr. McKean. The Committee requested that the Board provide information on Mr. McKean's appointment and that Mr. McKean testify at Mr. Meese's confirmation hearings in March 1984. Dewey, Ballantine responded to questions from the Senate Judiciary Committee and Mr. Joseph Califano, a partner in the firm, appeared with Mr. McKean at the hearings before the Committee.

Under 28 U.S.C. § 592, the United States Court of Appeals for the District of Columbia appointed Mr. Jacob Stein, an independent counsel, to investigate certain allegations concerning Mr. Meese, including his role in Mr. McKean's appointment. After this investigation began in April 1984, the Board made a distinction between (1) issues that related to the appointment of Mr. McKean to the Board of Governors and the appointment process, and (2) issues related to the "private matters" of Mr. McKean's accounting firm. According to Mr. Califano, the Board distinguished between inquiries into "the appointment process of Mr. McKean," and, on the other hand:

> "matters related to activities of Mr. McKean's public accounting firm representing Mr. Meese relating to tax returns, tax advice, and those kinds of matters. All of those matters, including incidentally the testimony of one of his partners before the Grand Jury have all been handled by a private firm at Mr. McKean's personal expense."
>
> Transcript of Closed Meeting of the Board of Governors at 5 (August 1984).

According to Dewey, Ballantine, the firm handled questions and gathered information pertaining to Mr. McKean's appointment. The law firm of Cooley, Godward, Castro, Huddleson and Tatum represented Mr. McKean's accounting firm in connection with the independent counsel's investigation.

The independent counsel concluded that there was no evidence that Mr. Meese solicited a loan from Mr. McKean with the express or implied intention of assisting him in obtaining a government position. Report of the Independent Counsel Concerning Edwin Meese III at 145 (September 2 1, 1984). In addition, the independent counsel concluded that there was no evidence to indicate that Mr. McKean offered to arrange the loans with the understanding that Mr. Meese would so assist him. Id.

On September 6, 1984, the House Committee also asked our Office to review Mr. McKean's role in the award of a Postal Service contract to the firm of Littler, Mendelson, Fastiff & Tichy (Littler, Mendelson). The House Committee's request stemmed from allegations that Mr. McKean's participation in the contract award violated conflict of interest laws. The House Committee concurrently requested a similar investigation to be conducted by the Office of Government Ethics (OGE). Dewey, Ballantine provided legal support to the Board during these investigations. Mr. Califano described the nature of these legal services as follows:

"[F]irm attorneys accompanied Board members, including Chairman McKean, to interviews * * * [with GAO and OGE]. In addition, much of what we did for the Board did not directly involve Chairman McKean. We assisted the Board in responding to investigators' requests for access to records of closed Board meetings."

Transcript of Closed Meeting of the Board of Governors at 7 (July 1985).

In addition to attending interviews with Board members and handling the access issues raised by GAO and OGE, we understand that the firm conducted an investigation into the matter at the request of the Board.

GAO's investigation terminated in a referral of the matter to the Department of Justice. (OGE also made a referral of the matter to Justice.) According to Dewey, Ballantine, after these referrals were made, Mr. McKean paid, and continues to pay, for any legal support provided to Mr. McKean by the firm with respect to Justice's criminal investigation. "Chairman McKean advised the Board that he would bear the cost of legal work to assist him personally in any investigation that the Justice Department may conduct." Id. at 5.

By letter dated July 17, 1985, the House Committee requested our opinion on (1) the authority of the Board of Governors to approve Postal Service expenditures, (2) the authority of the Postal Service to expend funds for the legal services of Dewey, Ballantine in connection with congressional investigations into Mr. McKean's appointment to the Board of Governors, and in connection with GAO and OGE's investigation of the

Littler, Mendelson matter, and (3) the legality and propriety of Mr. McKean's involvement in the Board's payment of Dewey, Ballantine's fees for legal services rendered during the congressional investigations. To provide the Board of Governors an opportunity to present its position on these issues, we requested, and on December 9, 1985, received, the views of the Board's legal counsel.

III. Analysis:

Question 1: Does the Board of Governors have authority to approve Postal Service expenditures?

Answer: Yes. Under the Postal Reorganization Act (Act), Pub. L. No. 91-375, 84 Stat. 719 (1970), the exercise of the power of the Postal Service is directed by a Board of Governors. 39 U.S.C. § 202(a). Moreover, the power to direct and control the expenditures of the Postal Service is specifically assigned to the Board of Governors. 39 U.S.C. § 205(a).

One purpose of the Act was to vest in the Board of Governors exclusive authority to manage the Postal Service. See Governors of United States Postal Serv. v. United States Rate Comm'n., 654 F.2d 108 (D.C. Cir. 1981). Under the Act, the Board has authority akin to that of a board of directors of a private corporation. See H.R. Rep. No. 91-1104, 91st Cong., 2d Sess. (1970). Therefore, we think the Board has authority to approve Postal Service expenditures, including expenditures of the Board.

Question 2: Did the Postal Service have authority to expend funds for legal services rendered by Dewey, Ballantine during the various investigations into (1) Mr. McKean's appointment to the Board of Governors, and (2) Mr. McKean's involvement in the contract award to Littler, Mendelson?

Answer: The Postal Service has broad authority to expend such funds as it deems necessary for legal services rendered in support of the Postal Service or its Board of Governors. Even so, funds may be expended only for those legal services which further official interests and are not the personal responsibility of any federal employee. In our opinion, the Postal Service did not have an official interest in preparing Mr. McKean for his testimony before the Senate Judiciary Committee and in making Mr. Califano available to accompany him to the hearings.

Discussion:

The Postal Reorganization Act of 1970 provided the Postal Service broad authority to enter into and perform contracts, and determine the character and necessity for its expenditures:

"(c) Subject only to the provisions of this chapter [chapter 20], the Postal Service is authorized to make such expenditures and to enter into such contracts, agreements, and arrangements, upon such terms and conditions and in such manner as it deems necessary, including the final settlement of all claims and litigation by or against the Postal Service." 39 U.S.C. § 2008(c) (emphasis added).

See also 39 U.S.C. §§ 401(3), 401(10). Thus, the Postal Service has a degree of freedom similar to that afforded public corporations. See B-105397, September 21, 1951. Congress considered this broad delegation of expenditure authority to the Postal Service necessary to permit the Service to conduct its affairs on a "businesslike basis." H.R. Rep. No. 91-1104, 91st Cong., 2d Sess. 6 (1970).

Despite the Postal Service's broad authority to expend such funds as "deem[ed] necessary," the Postal Service's authority to expend funds for legal services is not unlimited. Specifically, the Postal Service's authority to determine the necessity of its own expenditures does not permit the Board to condone an unlawful use. 14 Comp. Gen. 755 (1935), aff'd. A-60467, June 24, 1936; B-210929, August 2, 1983. In this regard, we think it is beyond dispute that Postal Service funds are not available to pay for purely personal legal services provided to its officers and employees. Stated conversely, Postal Service expenditures for legal services must be in furtherance of official interests of the agency. See 39 U.S.C. §§ 2003(a) (Postal Service funds available to carry out authorized purposes, functions, and powers of the Postal Service). The line of demarcation between official and personal expenses is not always clearly drawn.[1] An expenditure which primarily advances an official agency function or objective may be allowed, however, even if it also

[1]In B-133209, November 26, 1974, we recognized that President Nixon had a major personal stake in the outcome of the impeachment investigation. Nonetheless, we upheld the payment of legal expenses incurred by the White House in connection with the investigation, concluding that the President's role and interests extended beyond his personal desire to remain in office:

"Thus it may be said that a President does have an official as well as personal stake in an impeachment investigation. Further, we believe that it would be inappropriate—if not impossible—for our Office to attempt to separate a President's personal and official roles, or to pass upon the sincerity or reasonableness of a President's belief in his innocence or his belief that his defense is designed to vindicate his office as well as himself."

Id. at 7.

happens to benefit an individual employee,[2] but an expenditure, not specifically authorized by legislation and not primarily in furtherance of an official agency interest, is not allowed.[3] The focus in the present case, therefore, is on whether the expenditures were for services which were primarily in furtherance of an official agency interest.

As noted earlier, Dewey, Ballantine performed a variety of services in connection with the allegations surrounding Mr. McKean's appointment to the Board. In summary, Dewey, Ballantine conducted an investigation into the allegations reported in the press. During its investigation, the law firm interviewed members of the Board, including Mr. McKean, and reviewed Mr. McKean's records. The firm also handled requests for information that arose in connection with the investigations initiated by the congressional committees and the independent counsel. In addition, Mr. Califano appeared with Mr. McKean at the confirmation hearings of Mr. Meese before the Senate Judiciary Committee.

Counsel for the Board maintains that payment for all such legal services is clearly within the Postal Service's broad expenditure authority. In particular, they contend that the allegations concerning Mr. McKean's appointment called into question the integrity of the Board and all of its actions; therefore, the Board had a legitimate interest in having the matter carefully and impartially reviewed by the firm. Counsel for the Board also points out that the Postal Service "had a substantial interest in cooperating with other branches of government" conducting their own investigations of this matter; consequently, Dewey, Ballantine's services furthered an official interest. Dewey, Ballantine also argues that "the Board unquestionably had a legitimate and substantial interest in minimizing the personal costs and risks faced by one of its members when those costs and risks were occasioned by the very fact of, and for no other reason than, his having accepted an appointment to the Board."

[2]For example, we approved, as primarily for the benefit of the government, the use of appropriated funds to pay for physical exams and lab tests for federal employees at a chemical warfare laboratory. The exams were intended to detect arsenic poisoning in its early stages so as to prevent employee illness and consequent loss in working time. 22 Comp. Gen. 32 (1942). See also 45 Comp. Gen. 215 (1965); 3 Comp. Gen. 433 (1924).

[3]The Comptroller General has disapproved use of a general appropriation to employ a doctor to give preemployment examinations because such examinations were "personal expenses" of the job applicants. Implicit in the decision was the fact that these individuals were not employees of the government at the time of the examinations. Hence, it was not clear that the expense was primarily for the benefit of the government. 22 Comp. Gen. 243 (1942). See also 44 Comp. Gen. 312 (1964) and cases cited therein.

Notwithstanding these arguments, we question whether all of Dewey, Ballantine's services were rendered in furtherance of Postal Service interests.[4] We can accept that the Board had an interest in conducting an independent investigation in response to allegations that Mr. McKean had unlawfully obtained his position on the Board. The Board arguably had an interest in the veracity of the allegations in order to decide how to structure its relations with Mr. McKean, for example, in determining the suitability of Mr. McKean to be Chairman of the Board. We are hesitant to conclude that the firm's investigation was not in furtherance of agency objectives in light of the broad expenditure authority vested in the Board. We also think the Board had an official interest in responding to inquiries from congressional committees and the independent counsel. Given its broad discretion, we cannot legally object to the Board using Dewey, Ballantine to handle the requests for information.

In our opinion, however, the Postal Service did not have an official interest in preparing Mr. McKean for his testimony before the Senate Judiciary Committee, and in making Mr. Califano available to accompany him to the hearings. The hearings were to address the nomination of Edwin Meese to be Attorney General of the United States. They were in no way related to any duties of any member of the Board of Governors. The Committee did not solicit the views of any Board member, including Mr. McKean's, about Board matters. On the contrary, we understand that Mr. McKean was asked to testify at the hearings concerning loans he had made to Mr. Meese prior to his appointment to the Board. There had been allegations that Mr. McKean's appointment to the Board was influenced by these loans. Mr. McKean's testimony was wholly on conduct that occurred prior to his being appointed to the Board. Nomination of Edwin Meese III: Hearings Before the Senate Comm. on the Judiciary, 98th Cong., 2nd Sess. 602 (1984) (statement of John McKean). In these circumstances, we cannot perceive any official interest of the Postal Service, or the Board of Governors, in the Senate hearings.

Dewey, Ballantine contends, however, that the Board had an interest in minimizing the personal costs and risks faced by Mr. McKean because those costs and risks were due solely to his having accepted an appointment to the Board. In point of fact, the costs and risks were not due

[4]GAO does not have authority to render binding decisions with respect to matters involving Postal Service expenditures. See B-164786, October 8, 1970, followed in 58 Comp. Gen. 640 (1979). Hence, our opinion on these expenditures is advisory only.

solely to having accepted the appointment; they were due as well to allegations to the effect that he had purchased the appointment. More importantly, the costs incurred by the Postal Service were in connection with actions alleged to have occurred prior to Mr. McKean's appointment to and employment by the Board. The Board's desire to minimize the personal costs and risks faced by a Board member in responding to allegations he and apparently the other Board members believed were false is entirely understandable. Such desire, however, does not establish the necessary predicate to the Board's defraying a member's legal expenses, much less an official interest in the financial demands placed upon that member.

Applicable Justice Department regulations on representation of federal employees in civil and congressional proceedings, as well as decisions of the Comptroller General involving claims of federal employees for reimbursement of private legal fees, are predicated on the employee's action being within the scope of employment. See 28 C.F.R. §§ 50.15-50.16; 55 Comp. Gen. 408 (1975). Where an employee's action is in discharge of an official duty, the government has a clear interest in providing legal representation. However, the government does not have an interest in providing legal representation for questioned actions of an employee that predate federal employment. Since the hearings addressed Mr. McKean's actions that occurred prior to his appointment, and thus were actions not within the scope of his subsequent federal employment, the Board had no official interest in the matter, and thus no authority to pay for Dewey, Ballantine's preparation for and assistance in support of Mr. McKean's appearance before the Senate Judiciary Committee.

With respect to the GAO and OGE investigations into the Littler, Mendelson matter, the Board, in our opinion, was authorized to expend funds for the legal services of Dewey, Ballantine. In particular, Mr. McKean's actions with respect to the contract award were taken in his capacity as a Board member. Considering the Board's broad authority to expend such funds as it "deems necessary," we have no basis to question the Board's authority to use the assistance of the firm in responding to GAO and OGE investigations. We believe the firm's services were rendered in furtherance of Postal Service functions and hence the legal fees were not for matters personal to Mr. McKean.

Question 3: Was Mr. McKean's involvement in the Board's payment of Dewey, Ballantine's fees for legal services rendered during the congressional investigations legal and/or proper?

Answer: When legal assistance was needed in connection with the congressional investigations which began in 1983, Mr. Robert Hardesty was Chairman of the Board of Governors. Mr. Hardesty, apparently at Mr. McKean's request, directed Dewey, Ballantine to provide legal support to the Board and to investigate the allegations reported in the press concerning Mr. McKean's appointment. Mr. McKean also informed the Board that he had asked the firm to "assist me in cooperating with the investigation and to provide any legal advice which may be required in that regard." Transcript of Closed Meeting of the Board of Governors at 1 (April 1984). Mr. McKean's actions with respect to obtaining the assistance of Dewey, Ballantine was consistent with procedures established by the Board, and we can find no basis to criticize Mr. McKean's actions in this regard.

With respect to the Board's payment of the firm's fees, during eight Board meetings from April 1984 to August 1985, Mr. McKean raised the issue of the legality and propriety of the Board's decision to obtain and pay for the assistance of Dewey, Ballantine. Based on our review of Board transcripts, Mr. McKean's participation at these Board meetings involved answering any of the Board members' questions concerning the facts. At these meetings, the Board members repeatedly discussed the fees, and were made fully aware that Mr. Califano considered the Board's payment of such fees a legal expenditure. No Board member opposed payment of the firm's legal fees, and all the Board members apparently considered payment of the fees a proper expenditure of the Board.

One issue raised by Mr. McKean's involvement in the Board's decision to pay Dewey, Ballantine's fees, particularly with respect to the fees for Mr. Califano's preparation for and presence at the Senate hearings, is whether Mr. McKean violated federal conflict of interest laws. The specific issue is whether, considering the nature of Mr. McKean's involvement in the Board's decision, Mr. McKean violated the prohibition against a federal employee acting for the government where the employee's private economic interests are involved. In this regard, 18 U.S.C. § 208(a) provides that a federal employee cannot participate, personally and substantially, "through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise," in a matter in which the employee has a financial interest.

Section 208(a) was enacted as part of a general revision of the bribery and conflict of interest laws. Pub. L. No. 87-849, 76 Stat. 1119 (1962). This revision was promoted by "a growing concern, both in and out of

Congress, with the ever present and perplexing problems of how best to assure high ethical standards in the conduct of the Federal Government." H.R. Rep. No. 748, 87th Cong., 1st Sess. 2 (1962). To violate section 208(a), a federal employee must (1) engage in the kinds of personal participation prohibited under the statute and (2) have a financial interest in the matter. Our review did not establish that Mr. McKean participated, personally and substantially, in the kinds of activities set forth in 18 U.S.C. § 208(a), nor can we identify any financial interest that Mr. McKean may have had in the matter.

Comments From Dewey, Ballantine, Bushby, Palmer and Wood

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CABLE DEWBALAW

August 18, 1986

Andrea Kole, Esq.
General Accounting Office
441 G Street, N.W.
Washington, D.C.

Dear Ms. Kole:

Now on pp. 4, 5 and 6.

Thank you for the opportunity to respond to your draft report on the Authority of the Postal Service to Expend Funds for Legal Support Services.

The draft report concerns certain legal services provided by our firm to the Board of Governors of the Postal Service in our capacity as counsel to the Board. The services relate to an inquiry that we conducted in the fall of 1983, at the direction of Chairman Robert L. Hardesty, into questions raised in the press and under investigation by the General Accounting Office concerning the appointment of John R. McKean to the Board, and to the assistance we provided to ensure full cooperation with (1) Senate hearings on the nomination of Edwin Meese, III, to be Attorney General, (2) an Independent Counsel's investigation of Mr. Meese, and (3) an investigation by the GAO and the Office of Government Ethics concerning the award of a Postal Service contract to the law firm of Littler, Mendelson, Fastiff & Tichy.

Your draft report finds that the Board had authority to approve payment for the vast majority of legal services at issue here. Specifically, it finds that

Now on p. 12.

1. "[T]he Board has authority to approve all Postal Service expenditures, including expenditures of the Board." (P.4)

Now on p. 14

2. "The Postal Service has broad authority to expend such funds as it deems necessary for legal services rendered in support of the Postal Service or its Board of Governors." (P.5)

Now on p. 17

3. "[T]he Board had an interest in conducting an independent investigation in response to allegations that Mr. McKean had unlawfully obtained his position on the Board." (P.8)

Now on p. 17

4. "[T]he Board had an official interest in responding to inquiries from congressional committees and the independent counsel. Given its broad discretion, we cannot legally object to the Board using Dewey, Ballantine to handle the requests for information." (P.8)

Now on p. 18

5. "With respect to the GAO and OGE investigations into the Littler, Mendelson matter, the Board, in our opinion, was authorized to expend funds for the legal services of Dewey, Ballantine." (P.9)

Now on p. 19

6. "Mr. McKean's actions with respect to obtaining the assistance of Dewey, Ballantine was consistent with procedures established by the Board, and we can find no basis to criticize Mr. McKean's actions in this regard." (P.10)

We agree with all of the above findings of the draft report.

The draft report disputes the Board's authority to authorize one aspect of the legal services at issue here. It states that

> "[i]n our opinion . . . the Postal Service did not have an official interest in preparing Mr. McKean for his testimony before the Senate Judiciary Committee, and in making Mr. Califano available to accompany him to the hearings." (P.8)

Now on p. 17

Based on that finding, it concludes that the Board had "no authority to pay for Dewey, Ballantine's preparation for and assistance in support of Mr. McKean's appearance before the Senate Judiciary Committee." (P.9)

Now on p. 18

Now on p. 17.

The draft report notes that your opinion on this matter is "advisory only" since the "GAO does not have authority to render binding decisions with respect to matters involving Postal Service expenditures." (P.8, n.4) Despite its advisory nature, your opinion on this point deserves a detailed response because, in our judgment, it misapprehends the interests of the Postal Service in this matter and misconceives the powers and responsibilities that Congress assigned to the Board under the Postal Reorganization Act.

Your analysis raises two basic questions: First, was there a connection between the legal services at issue here (preparing Mr. McKean for and accompanying him to the Senate hearing) and the interests of the Postal Service? And second, who should decide whether there was such a connection? We disagree with the draft report's reasoning and conclusions on each of these questions.

1. The Interests of the Postal Service

Your report indicates that the GAO can discern no interest of the Postal Service in providing assistance to the Chairman of its Board to enable him to respond effectively to a request from a Senate Committee that he give testimony about his appointment to the Board. That position is plainly in error. Indeed, it is contradicted by the express findings of the draft report itself.

Now on p. 17.

The Senate Committee asked Mr. McKean to appear to testify on matters related directly to his tenure on the Board. Mr. McKean was not under investigation by the Senate Committee. Contrary to the assertion in your report, the legal services authorized by the Board were not for the purpose of "defend[ing]" him. (P.9) Mr. McKean was asked to testify about allegations concerning the manner in which the President had appointed a member of the Board. As the agency directly concerned, the Postal Service had much more than just an interest in cooperating fully with the Senate Committee's investigation; it had an obligation to do so.

The allegations about which Mr. McKean was asked to testify threatened to undermine public confidence in the integrity of the Board and all its actions. Recognizing the obvious interests of the Postal Service in addressing these concerns, the Board had already conducted its own investigation. By the time of the Senate Committee hearing, the Board had been advised, on the basis of that internal re-

view, that the suspicions about the process by which Mr. McKean was appointed were unfounded. To ensure that the Senate Committee could explore these questions thoroughly and reach its own judgment about the integrity of the appointment, the Board was determined to cooperate fully with the Senate Committee inquiry. To that end, and at the Board's direction, we responded to numerous questions from the Committee staff, gathered and submitted a substantial amount of factual information that the Committee requested, and, when Mr. McKean was asked to testify, assisted him in preparing for the hearing and accompanied him to it.

Out of all these activities, the draft report singles out the time spent assisting Mr. McKean to prepare for the Senate hearing, and accompanying him to it, and it declares that the Postal Service had no interest in this one aspect of the services our firm was asked to provide. The only explanation offered by the report for singling out these services is that "the hearings addressed Mr. McKean's actions that occurred prior to his appointment . . . ." (P.9) That explanation is wholly inadequate to justify the conclusion stated in the draft report.

Now on p. 18.

The draft report itself explicitly recognizes that "the Board had an interest in conducting an independent investigation in response to allegations that Mr. McKean had unlawfully obtained his position on the Board." (P.8) Yet it was precisely these same allegations that Mr. McKean was asked to testify about at the Senate Committee hearing. The draft report nowhere explains the reasoning that underlies its startling conclusion that even though the Board had an interest in conducting its own investigation into the matter, it did not have an interest in cooperating with a Senate Committee investigating the same matter.

Now on p. 17.

What makes the conclusion even more difficult to understand is the draft report's explicit acknowledgment that the Postal Service did, of course, have "an official interest in responding to inquiries from congressional committees and the independent counsel." (P.8) Thus, the draft report would have one believe that even though the Postal Service had an interest in responding to congressional inquiries on this subject, it had that interest only so long as the responses were not provided in person by the Board's Chairman at a hearing he was asked to attend by the Senate Committee.

Now on p. 17.

The plain fact is that the Board had an interest in satisfying itself about the allegations concerning Mr.

McKean's appointment and, with public confidence in the integrity of the Board very much at stake, it also had an interest in cooperating fully with a Senate Committee that wanted to explore these same questions. As part of that cooperative effort, the Board directed us to assist Mr. McKean in preparing for the Senate hearing. Under these circumstances, we see no reasonable basis on which one could conclude that the testimony of the Board's Chairman was unconnected with any interest of the Postal Service or the Board.

2. The Board's Responsibility

The analysis of the draft report is flawed not only because it fails to recognize the interest of the Postal Service in Mr. McKean's testimony before the Senate Committee, but also because it disregards a fundamental principle of the Postal Reorganization Act -- namely, that the Postal Service is to determine the necessity of its own expenditures.*

As your report acknowledges, the Board on numerous occasions discussed the legal services at issue here, and "all the Board members apparently considered payment of the fees a proper expenditure of the Board." (P.11) Yet your report concludes that the Board lacked authority to approve payment as to one aspect of these legal services because the Board's judgment about the interests of the Postal Service does not coincide with the GAO's.

Now on p. 19

One of the central recommendations of the Kappel Commission was that the new postal authority should have "the authority to determine the character and necessity of its expenditures . . . ." The President's Commission on Postal Organization, Towards Postal Excellence 55 (1968). Congress

* See, e.g., 39 U.S.C. § 2008(c):

"Subject only to the provisions of this chapter, the Postal Service is authorized to make such expenditures and to enter into such contracts, agreements, and arrangements, upon such terms and conditions and in such manner as it deems necessary . . . ." (Emphasis supplied).

implemented that recommendation, and, as a result, the Postal Service enjoys in its "fiscal affairs" a "greater degree of autonomy than that enjoyed by the executive agencies." Milner v. Bolger, 546 F. Supp. 375, 379 (E.D. Cal. 1982). Except as specifically provided, "no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, . . shall apply to the exercise of the powers of the Postal Service." 39 U.S.C. § 410(a).

The draft report ignores these basic principles, which go to the heart of the congressional scheme. Under the view expressed in the draft report, the Board's authority to determine the necessity of its expenditures is subject to an implied limitation: the expenditure must serve the interests of the Postal Service as defined by the GAO.

That view -- unsupported by precedent or reference to the language or legislative history of the Act -- would undermine a central purpose of the statutory scheme and could severely impair the Board's ability to direct the exercise of the power of the Postal Service. Cf. Governors of the United States Postal Service v. Postal Rate Commission, 654 F.2d 108, 113-14 (D.C. Cir. 1981); Kappel Commission Report, supra, at 33-34, 55. The extent of the potential interference with the ability of the Postal Service to administer its affairs in a "businesslike" way, cf. H.R. Rep. No. 91-1104, 91st Cong., 2d Sess. 6 (1970), is demonstrated by the examples offered in the draft report. They indicate that, under the GAO's approach, the Postal Service would have "no authority" to provide for preemployment medical examinations for prospective employees or to pay bar admission fees for attorneys in its Law Department, since the GAO would consider these expenditures "personal" and "primarily of benefit to the employee." (P.7, n.3) In our judgment, it could hardly be more clear that the Postal Service does have the authority to make such expenditures if it deems them "incidental, necessary, or appropriate to the carrying on of its functions . . . ." 39 U.S.C. § 401(10). The GAO may have a different view about the wisdom of the expenditures and about whether they would, in fact, further the interests of the institution. But Congress assigned to the Postal Service, and not the GAO, the responsibility to determine which expenditures would further its interests. The fact that the GAO might on occasion define the interests of the Postal Service differently does not mean that the Postal Service lacks authority to make the expenditures.

In sum, we believe that the Board had a clear and substantial interest in assisting its Chairman to respond effectively to a request from a Senate Committee for testimony about his appointment to the Board. Although the GAO evidently disagrees, there cannot be any serious question about the legal authority of the Postal Service to provide the assistance. Pursuant to the responsibility conferred on it by Congress to direct the exercise of the power of the Postal Service, the Board concluded that the Postal Service did have an interest in the matter and that the expenditure was appropriate. Since the Act expressly assigns to the Postal Service the responsibility to determine the necessity of its own expenditures, the expenditure was plainly within the Board's authority.

As noted at the outset, we appreciate the opportunity to comment on the draft report. It is our understanding that our comments will be included as an appendix to your report when it is released in final form. Since our comments quote extensively from the text of the draft report, and since we understand that the draft may be revised prior to publication, we would be grateful if you could bring any significant changes to our attention prior to publication so that we can adjust our comments accordingly.

Yours very truly

DEWEY, BALLANTINE, BUSHBY,
PALMER & WOOD

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